U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 11 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a dual language immersion teacher with the , Texas. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 22, 2011. On an accompanying Form ETA 750B, Statement of Qualifications of Alien, the petitioner described her duties:

> Prepare lesson plans tailed [*sic*] to the learning patterns of students in the English as a Second Language program; Engage in instruction with regard to English linguistics such as syntax, phonology, semantics and pragmatics; Recognize and emply [*sic*] effective strategies for increasing communicative competence in English through the use of visuals and speech to make language comprehensible to the student; Prepare

> materialsand [*sic*] demonstrate strategies to help students transition from the use of social language to more formal vocabulary; identify culturally responsive instruction.

In an introductory statement, counsel stated that the petitioner's

> nearly decade-long career as a Dual Language Immersion teacher conclusively demonstrate [*sic*] that she is already serving the United States' national interest to a significantly greater extent than other educators in the field.
>
> . . . [The petitioner's] highly valuable services as an educator within Dual Language Immersion programs produces superior test results in comparison to English-only classrooms, and traditional "bilingual classrooms.". . . Based on the established, higher test scores of students participating in traditional bilingual as well as Dual Language Immersion programs, the services of bilingual instructors, such as [the petitioner], are invaluable in states with high levels of English Language learners.

The above assertions concern the intrinsic merit of dual language immersion programs. There is no blanket waiver for dual language immersion teachers, and therefore the petitioner must establish how she, individually, qualifies for an exemption from the job offer requirement that normally applies to professionals such as herself. Counsel stated:

> [redacted] where Applicant is employed, will be implementing this program on a larger scale in the next school year. The program will be monitored and studied not only by the district's researchers, but also in cooperation with local university researchers. [The petitioner's] experience in this field will play a crucial and pivotal role in the success of the program and the development of study methods and measures. She will be able to assist the school and researchers in identifying the areas of practice that are key for measurement while keeping the goals of the program intact for the learners.

Counsel contends that "the supporting evidence amply confirms [the petitioner's] status as a critical and seminal figure in the field of Dual Language Immersion education," as well as "a national figure substantially contributing to" that field. Some of the supporting evidence consists of the petitioner's basic credentials, such as academic degrees and certifications. Those materials show that the petitioner is qualified to teach, but do not establish her claimed standing in the field.

The petitioner also submitted background materials about dual language immersion. Among the submitted background materials is an article by V.P. Collier and W.P. Thomas, "The Astounding Effectiveness of Dual Language Education for All." The authors summarized their "research findings of the past 18 years," using data from "15 different states." The study attests to the merits of the dual language model, while making it clear that this model has been in use for "decades." A printout from the web site of the Center for Applied Linguistics identified 392 "Two-Way Bilingual Immersion Programs in the U.S." The list does not name [redacted] or any school in

These background materials do not mention the petitioner and, therefore, fail to show that she is "a critical and seminal figure" in her field.

The only remaining initial exhibits are letters signed by two former teachers. a former dual immersion teacher in California, is now a senior educational sales representative for which sells "educational materials." a former bilingual educator for the , did not identify her current occupation (her résumé, submitted with her letter, stops at 2007). The two letters contain passages that are very similar, and at times identical. Both letters, for example, include the sentence: "Thus, acquiring a second langue [*sic*] requires a qualified bilingual educator." Both letters contained the same misspelling of the word "language."

Both of the witness letters focused on the overall importance of dual immersion language, rather than on any specific achievements or contributions by the petitioner. The concluding paragraph of each letter began with the assertion that the petitioner's "services in bilingual education are critically important on a national level, and particularly in states where the rate of English Language Learners (ELLs) continues to grow." The letter attributed to Ms. indicated that the petitioner "is exceptionally, well-qualified to provide services in the field of bilingual education based on her formal college education, which she received in the Spanish language, and her collective eight years serving as an educator in the United States." The letter attributed to Ms. contained almost exactly the same sentence, except it lacked the word "collective" and the superfluous comma after "exceptionally."

The shared language in the two letters suggests that the language in the letters is not the authors' own. *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

The petitioner's initial evidence does not support counsel's claim that the petitioner has earned "status as a critical and seminal figure in the field of Dual Language Immersion education."

The director issued a request for evidence on September 7, 2011, instructing the petitioner to "submit evidence that the beneficiary's contributions will impart national-level benefits, as opposed to benefitting only those the beneficiary will teach." In response, counsel stated:

> Dual language programs . . . are still quite new and are in a developmental stage. Most school districts are implementing these programs in a few schools at a time and most school districts look to the experiences of other school districts to help shape and formulate their dual language programs. . . .

> Rather than simply preparing students to contribute to the national economy, [the petitioner] is engaged in the early stages of developing a pedagogy that will be duplicated across the United States. . . .
>
> She is participating in the development of this pedagogy at the ground level and the pedagogy cannot be developed without this contribution. Her proposed employer is engaged in the establishment of this program and has selected [the petitioner] as one of the few teachers who will help to develop the program through teacher training, classroom experience, and reporting results. Her experiences, observations, and results will be reported to the Dual Language Advisory Committee who will then use this to change, improve, or identify effective methodologies for continuing and expanding the program. The results will be looked at by other school districts and examined by scholars. Without the contribution of experienced educators like [the petitioner], however, the foundational development of this pedagogy would not be possible. In other words, as a teacher in this developing educational field [the petitioner] is in a unique position where she can exert a significant degree of influence on the development of this pedagogy as a whole in the United States.

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted additional background materials about dual language immersion in general, and program in particular. documents identified six schools that would participate in a dual language immersion pilot program in 2011-2012. was not among the six named schools. The petitioner's name does not appear in the materials.

An unsigned statement in the record includes the claim that "[t]he program is a role-model for other school districts across the United States. Here, executives who obtained their data from teacher experiences are presenting as experts to the school districts that are members of the American Youth Policy Forum." The accompanying evidence included seven "Presenter Biographies" for "Building Capacity to Promote College- and Career-Readiness for English Language Learners." Four of the profiled presenters were administrators at ; all seven were based in central Texas. Devoid of context, the biographies do not show whether the presenters made the presentations before a national audience as opposed to a statewide or local one. Because the materials do not mention the petitioner at all, they do not support the claim that the petitioner played a significant role – or any role at all – in developing the dual language immersion pedagogy.

The director denied the petition on January 17, 2012, stating: "The requested waiver primarily rests on the issue of the importance of dual language systems and the chance that the petitioner's teaching may affect the nation." The director noted that the petitioner submitted "[n]o testimonial letters from major public school districts vouching for the petitioner's individual importance" to the endeavor,

and found that the petitioner had not established that her individual efforts would yield benefits that are national in scope.

On appeal, counsel maintains that the waiver application rests not on the petitioner's classroom work, but "on her role in the development of a new educational pedagogy, Dual Language Immersion." Counsel observed that the petitioner supported this claim with documentation that "established that Dual Language Immersion . . . is in its developmental stage." The documentation did not, however, establish the petitioner's role in developing the pedagogy, and the petitioner has not submitted any evidence to specify exactly what contributions the petitioner has made in this regard. Instead, the petitioner has stressed the overall importance of relying on qualified and experienced teachers to implement and refine the methods. This is a general assertion that says nothing specifically about the petitioner, and, as previously noted, there is no blanket waiver for teachers involved in dual language immersion pedagogy.

Counsel stated that the director failed to consider "evidence showing that the School District is actively educating other school districts about what makes an effective program." The submitted evidence shows that administrators participated in presentations, but it says little about those presentations. Furthermore, once again, the submitted evidence did not indicate that the petitioner was in any way involved in those presentations. The list of schools participating in the dual language immersion pilot program did not include the petitioner's school, and there is no evidence that the petitioner had participated in the program at all as of the petition's July 2011 filing date. Rather, the initial submission implied that the petitioner would eventually become involved, following an expansion of the program at some unspecified point in the future. The American Youth Policy Forum presentation, meanwhile, took place in May 2010.

The petitioner has submitted no evidence that pilot program has, in fact, served as a model for other school districts, or that the petitioner was involved in that pilot program as of the petition's filing date. The expectation of the petitioner's future involvement, or the program's future influence, cannot suffice. *NYSDOT* requires a past history of demonstrable achievement with some degree of influence on the field as a whole. *Id.* at 219 n.6. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). General statements about the overall importance of dual language immersion, coupled with speculation about how the petitioner's work in the area will eventually be imitated nationwide, cannot suffice to establish the petitioner's eligibility for the national interest waiver.

Counsel, on appeal, has not shown that the director erred in denying the petition based on the evidence submitted.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to

grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.